

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VERNITA McCORMICK and U.S. POSTAL SERVICE,  
POST OFFICE, Princeton, NJ

*Docket No. 98-305; Submitted on the Record;  
Issued October 27, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, the Office accepted that appellant sustained a cervical strain in the performance of duty on November 18, 1993, and appellant began receiving compensation for temporary total disability. The Office determined that a conflict in the medical evidence developed, with respect to a continuing employment-related disability, between the attending physician, Dr. Stanley L. Friedman, an osteopath, and Dr. Stuart G. Dubovitch, an osteopath selected as a second opinion referral physician. Appellant was referred to Dr. James R. Rogers, a Board-certified internist, to resolve the conflict. By decision dated November 30, 1995, the Office terminated appellant's compensation.

Appellant requested reconsideration, and initially the Office found that the request was untimely in a decision dated May 21, 1997. By decision dated August 14, 1997, the Office vacated the May 21, 1997 decision, and found the request was timely but the evidence submitted was not sufficient to warrant reopening the claim for merit review.

The Board has reviewed the record and finds that the Office abused its discretion in denying merit review of the claim.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>1</sup> Since appellant filed her appeal on October 29, 1997, the only decision over which the Board has jurisdiction on this appeal is the August 14, 1997 decision denying her request for reconsideration.

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<sup>1</sup> 20 C.F.R. § 501.3(d).

In the present case, the Office received a March 4, 1997 letter from appellant's congressional representative stating that appellant had requested reconsideration of the November 30, 1995 termination decision on January 6, 1996, and yet had not received a response. The record contains a letter from appellant dated January 6, 1996 requesting reconsideration and also a copy of a certified mail receipt indicating a mailing on January 6, 1996 and receipt by the Office on January 11, 1996.

The August 14, 1997 Office decision accepts that appellant filed a timely reconsideration request, but finds that the evidence submitted was insufficient to warrant merit review of the claim.<sup>2</sup> The Board finds, however, that the delay in issuing the reconsideration decision requires that appellant be given a merit review of her claim. The record indicates that a request for reconsideration was mailed to the Office within two months of the November 30, 1995 termination decision. Apparently the reconsideration request was misplaced and the Office did not issue a decision denying merit review of the claim until nearly two years after the termination decision. Under these circumstances appellant has effectively been precluded from seeking a further merit review by the Office or a Board review of the merits of the termination decision.<sup>3</sup> The Board has held that such a delay constitutes an abuse of discretion by the Office in that it deprives a claimant of the opportunity to properly exercise his or her appeal rights.<sup>4</sup> The Board also notes that the Office's procedure manual provides that when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to have review of the merits of a case by the Board, the Office should conduct a merit review.<sup>5</sup>

Accordingly, the Board finds that the Office abused its discretion in denying merit review in this case. On remand, the Office should issue a *de novo* decision on the merits of the claim based on all of the evidence of record.

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<sup>2</sup> To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> A claimant has one year to request reconsideration of a merit decision pursuant to 20 C.F.R. § 10.138(b)(2), and one year to file an appeal with the Board under 20 C.F.R. § 501.3(d).

<sup>4</sup> See Anthony A. Degenaro, 44 ECAB 230 (1992); Charles E. Varrick, 33 ECAB 1746 (1982).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 1997).

The decision of the Office of Workers' Compensation Programs dated August 14, 1997 is set aside and the case remanded for a decision on the merits of the claim.

Dated, Washington, D.C.  
October 27, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member